

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

3 TEXAS DEMOCRATIC PARTY, DEMOCRATIC) AU:19-CV-01063-LY
SENATORIAL CAMPAIGN COMMITTEE,)
4 DEMOCRATIC CONGRESSIONAL CAMPAIGN)
COMMITTEE, EMILY GILBY, TERRELL)
5 BLODGETT, TEXAS YOUNG DEMOCRATS,)
TEXAS COLLEGE DEMOCRATS,)
6)
Plaintiffs,)
7)
V.) AUSTIN, TEXAS
8)
RUTH HUGHS,)
9)
Defendant.) MARCH 25, 2020
10 -----
11 RACHEL MILLER, TEXAS DEMOCRATIC) AU:19-CV-01071-LY
PARTY, DNC SERVICES CORP., DSAC, DCCC,)
12)
Plaintiffs,)
13)
V.) AUSTIN, TEXAS
14)
RUTH HUGHS,)
15)
Defendant.) MARCH 25, 2020

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LEE YEAKEL

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23
24 Proceedings recorded by computerized stenography, transcript
25 produced by computer.

14:02:13 1 (In chambers)

14:02:13 2 THE COURT: All right. Let's start with the
14:02:14 3 plaintiffs, and will somebody tell me who all is representing
14:02:18 4 the plaintiffs in this case.

14:02:20 5 MR. HAMILTON: I will, Your Honor. Good afternoon.
14:02:23 6 It's Kevin Hamilton on behalf of the plaintiffs -- or at least
14:02:27 7 the *Gilby* plaintiffs. And with me is John Geise, Chad Dunn,
14:02:33 8 and Amanda Beane.

14:02:36 9 THE COURT: All right. Any other party
14:02:39 10 representatives of any of the plaintiffs?

14:02:42 11 MR. HICKS: Yes, Your Honor. Renea Hicks here for
14:02:45 12 Terrell Blodgett, Texas Young Democrats and Texas College
14:02:48 13 Democrats. And there's no one else on the phone with me on
14:02:51 14 this.

14:02:51 15 THE COURT: All right. Let me get you checked off
14:02:56 16 here.

14:02:56 17 All right. And for the defendants?

14:03:03 18 MR. SWEETEN: Your Honor, this is Patrick Sweeten.
14:03:04 19 With me is Will Thompson and Eric Hudson. And we've got I
14:03:07 20 think remotely is Michael Abrams is on the line, too.

14:03:14 21 THE COURT: Mr. Abrams, are you there?

14:03:16 22 MR. ABRAMS: Yes, Your Honor.

14:03:16 23 THE COURT: All right. I think we've got everybody.
14:03:18 24 Okay. Talk a little bit about this, and I know
14:03:22 25 couple of you at least were on the line yesterday when we had

14:03:25 1 the case -- a hearing in another case involving the Secretary
14:03:31 2 of State. So basic ground rule is, when anybody speaks, first
14:03:36 3 thing you do is state your name so we can get you on the record
14:03:40 4 here.

14:03:40 5 We have in place the earlier scheduling order that I
14:03:48 6 entered on December -- that I signed on December 30th which
14:03:51 7 sets some dates for the filing of dispositive motions and
14:03:56 8 discovery cutoff and what have you. We've scheduled this as a
14:04:00 9 scheduling conference. So the first thing I'd like to ask --
14:04:06 10 and whoever wants to speak can do it -- what do we need to
14:04:12 11 schedule?

14:04:12 12 It seems to me we've got the motion to dismiss
14:04:15 13 pending. We need to schedule it. And then do we want at this
14:04:21 14 time to go ahead and schedule the case on the merits to see if
14:04:24 15 it survives the pretrial motions? Do we need to also get a
14:04:35 16 setting on any other motions that get filed in May? I'm pretty
14:04:39 17 flexible on this because we're not doing a whole lot right now.

14:04:42 18 The biggest problem you have is, because we're not
14:04:45 19 doing a whole lot right now, if we extend anything in this case
14:04:48 20 much past May or early June, you're not likely to get a
14:04:53 21 judgment before the November election. So you need to have
14:04:58 22 that in your mind. We have a big docket here anyway, and
14:05:02 23 the -- the plague has not assisted it in any way because of
14:05:07 24 what we have to do with the calendar.

14:05:10 25 So whoever wants to come first with suggestions, I'm

14:05:12 1 happy to hear you.

14:05:16 2 MR. HAMILTON: Your Honor, this is Kevin Hamilton on
14:05:18 3 behalf of the *Gilby* plaintiffs. And thank you.

14:05:22 4 THE COURT: Mr. Hamilton, are you saying the "guilty
14:05:25 5 plaintiffs"?

14:05:27 6 (Laughter)

14:05:27 7 MR. HAMILTON: "Gilby," but thank you. Hopefully
14:05:31 8 they're not guilty. We've had a number of discussions with
14:05:36 9 Mr. Sweeten over the course of the last few days, and there's a
14:05:40 10 number of things that I think we've agreed to with respect to
14:05:43 11 discovery and scheduling. So I'll just tick these off for the
14:05:47 12 Court's consideration.

14:05:49 13 First, as you'll recall, we were on the phone with
14:05:51 14 you earlier this week with respect -- or maybe last week --
14:05:54 15 with respect to a dispute over depositions. We've worked that
14:05:58 16 all out now and agreed on a process for taking depositions by
14:06:02 17 videotape and to work cooperatively to make that happen.

14:06:06 18 But we've agreed, under the circumstances, because of
14:06:08 19 the coronavirus and the problems that that presents, that the
14:06:18 20 discovery cutoff should be moved back to June 1st. And I've
14:06:22 21 assured Mr. Sweeten that, if he's unable to complete necessary
14:06:25 22 discovery by that date, that we would confer with him in good
14:06:29 23 faith to address any remaining discovery that he needed to
14:06:33 24 take.

14:06:33 25 Second, we've agreed that the expert witness

14:06:40 1 disclosure deadlines should remain undisturbed but that the
14:06:45 2 filing deadline for Daubert motions should be slid back to
14:06:49 3 May 15th, so moving it back two weeks.

14:06:54 4 And then, finally, we've agreed the dispositive
14:06:59 5 motions deadline should be moved back to June 1st. Now, we
14:07:05 6 recognize that has an impact on the Court's schedule as well.

14:07:08 7 Speaking for the plaintiffs, all of this is in the
14:07:10 8 hopes that we can complete discovery and set the case for a
14:07:13 9 trial date this summer. Candidly, though, given the Court's
14:07:19 10 comments about the trial calendar and the impact of the
14:07:22 11 pandemic that has descended on us all, that seemed uncertain at
14:07:28 12 this point. Our first preference would be, of course, to have
14:07:33 13 a trial on the merits in the summer.

14:07:35 14 THE COURT: All right. Let me interrupt you right
14:07:37 15 there, Mr. Hamilton. This whole thing gets much easier if we
14:07:47 16 could go right to trial with it. The problem you have in
14:07:50 17 getting a trial setting is, right now I have a motion to
14:07:52 18 dismiss pending and you're anticipating filing further
14:07:59 19 dispositive motions if it survives the motion to dismiss. All
14:08:08 20 of this -- and I realize what lawyers like to do -- but it
14:08:11 21 slices and dices the case up and pushes you down the line,
14:08:14 22 because it means I don't just have one thing I have to worry
14:08:17 23 about setting, I have three things I have to worry about
14:08:20 24 setting.

14:08:21 25 These kinds of cases I don't find as difficult

14:08:28 1 logistically as the lawyers do. I can't for the life of me
14:08:33 2 figure out, except I always fail in this plea, why I have to
14:08:38 3 have a dispositive motions deadline, why we should even have
14:08:42 4 dispositive motions. I've got the motion to dismiss I have to
14:08:46 5 take up, and then if I've got a schedule a dispositive --
14:08:54 6 hearing on dispositive motions and your deadline going to be
14:08:59 7 June the 1st, then we've got to have a response and then
14:09:02 8 there's got to be a reply. And then I've got to set it, or if
14:09:06 9 you don't want to have oral argument on it, that doesn't help
14:09:09 10 me at all in the amount of time I have to spend in considering
14:09:13 11 it.

14:09:14 12 All of these things that you're allowed to do by the
14:09:17 13 rules just put your case off down the line and makes it a lot
14:09:22 14 harder for the Court to deal with it. So I just tell you that.

14:09:27 15 If we don't get this done by November, it won't be --
14:09:32 16 or if I don't get a judgment out by November, it won't be
14:09:35 17 because I had trouble finding you a trial date. It's because I
14:09:41 18 had trouble setting everything separately that you want to set,
14:09:46 19 including any objections to Daubert motions. And you-all, you
14:09:53 20 know, will immediately get gold stars if I don't see any,
14:09:56 21 because everybody since we had Daubert objects to experts. I
14:10:04 22 think I could have a theoretical physics case, and one of you
14:10:08 23 would designate Einstein and I would get a Daubert motion.

14:10:12 24 So it's all of the motions, it's the run-up, that
14:10:15 25 holds you off getting a final determination. It's not dealing

14:10:19 1 with the case. So I want everybody to understand that, because
14:10:22 2 I am worried about getting this done by the November election.
14:10:26 3 But the reason I'm worried about it is not that this is a
14:10:31 4 difficult case for me to try. It's just that we have to slice
14:10:35 5 and dice it. So there you go. End of rant.

14:10:39 6 MR. HAMILTON: Your Honor, if I could just jump in
14:10:41 7 here. Maybe I've got a solution. I discussed this with
14:10:47 8 Mr. Sweeten as well yesterday. Our plan was, because of some
14:10:50 9 of the considerations that you mentioned and what we imagined
14:10:53 10 was going to be a crowded docket, was to file a motion for
14:10:56 11 preliminary injunction by April 10th. That eases the need for
14:11:01 12 a lot of this.

14:11:03 13 THE COURT: No. No. That gives me one more hearing
14:11:06 14 I have to have. But that's fine. You know, if you can agree
14:11:16 15 on a preliminary injunction, that would be great. But you're
14:11:19 16 not helping me if I get a motion for preliminary injunction in
14:11:24 17 April, because that just means it's one more thing I've got to
14:11:27 18 deal with, because sooner or later I'm going to have to hear
14:11:31 19 the dispositive motions and the Daubert motions and the motion
14:11:34 20 to dismiss.

14:11:37 21 MR. HAMILTON: Understood, your Honor. I think the
14:11:39 22 idea was that we would -- we would be filing a preliminary
14:11:43 23 injunction motion and deciding it on the papers. As far as I'm
14:11:50 24 concerned, if there's a motion to dismiss pending -- and there
14:11:53 25 is -- and we're filing a motion for preliminary injunction, I

14:11:56 1 don't see the need for a dispositive motion at that point if
14:11:58 2 any part of the case -- you know, if we achieve -- if the Court
14:12:02 3 grants the preliminary injunction motion, we can set the trial
14:12:08 4 well after the election. There's no need. It takes all the
14:12:10 5 pressure off.

14:12:11 6 If the Court denies the preliminary injunction
14:12:13 7 motion, then I'm not -- I'm just -- you know, obviously we
14:12:17 8 would prefer to have a trial date before the summer. But, if
14:12:20 9 that's going to -- the Court's calendar is probably going to
14:12:25 10 control that.

14:12:25 11 THE COURT: Well, keep going.

14:12:34 12 MR. HAMILTON: That's the main gist of what I was
14:12:37 13 going to say. There's one open dispute between the parties
14:12:40 14 that we have not been able to resolve. And that is the State's
14:12:44 15 request for leave to take more than ten depositions, the
14:12:48 16 presumptive cap under the federal rules. We just don't believe
14:12:50 17 that's necessary or appropriate. Most of the -- the reason
14:12:55 18 that's been advanced is because the plaintiffs have identified
14:12:58 19 more than ten potential individuals who may have relevant
14:13:03 20 knowledge under the Rule 26 disclosure.

14:13:06 21 We, out of an abundance of caution, listed folks that
14:13:11 22 we haven't even talked to but, because of their position as
14:13:14 23 state office holders, likely or may have relevant information
14:13:18 24 about the conduct of elections or the purpose of the
14:13:20 25 legislation. If we're proceeding on a preliminary injunction

14:13:24 1 motion, there's no need for a full-blown discovery. If we're
14:13:28 2 doing a full-blown discovery, then we might as well accelerate
14:13:36 3 and head to trial.

14:13:36 4 But, in any event, if the Court denies the motion for
14:13:37 5 a preliminary injunction and sets a trial date in the fall or
14:13:40 6 sometime after the election, then we'll have plenty of time to
14:13:44 7 do discovery then.

14:13:45 8 THE COURT: Well, I strongly believe that both sides
14:13:48 9 are making this case way more complicated than it is. But
14:13:52 10 what -- what have you done with regard to the plaintiffs'
14:13:55 11 motion to compel production? That seems to me like that's an
14:13:59 12 open dispute that's still out there.

14:14:04 13 MR. SWEETEN: Your Honor, this is Patrick Sweeten on
14:14:07 14 behalf of the secretary of state. And to answer your question
14:14:12 15 directly first, and then I can address some of the matters that
14:14:13 16 Mr. Hamilton raised, we have briefed that motion. That motion
14:14:17 17 was about the issue of legislative privilege. We have filed
14:14:24 18 our response to that, and that is at this point with the Court.
14:14:29 19 That's where that stands.

14:14:30 20 As the Court mentioned earlier, we do have a motion
14:14:33 21 to dismiss outstanding. The Court heard the arguments
14:14:39 22 yesterday. There's some overlap with respect to the motion to
14:14:42 23 dismiss. There's quite a bit in this case. So that, as the
14:14:45 24 Court has identified, is an open question.

14:14:47 25 Let me kind of go back, if this is okay, Your Honor,

14:14:50 1 to talk about some of the things that Mr. Hamilton addressed.

14:14:53 2 First of all, we heard this Court when last Tuesday

14:14:59 3 the plaintiffs, you know, wrote the Court and sought a hearing

14:15:03 4 and we had a hearing. We heard this Court, and we've had --

14:15:06 5 since that time, we've had three telephone conferences and

14:15:10 6 we've sent out probably half a dozen e-mails exchanged between

14:15:14 7 us as we're trying to work through this issue.

14:15:17 8 We have -- as we were working towards it, as of

14:15:20 9 yesterday, we thought we'd probably figured out a scheduling

14:15:26 10 order that might work. I think there were a couple of issues.

14:15:28 11 One is we wanted to make sure the dispositive deadline went

14:15:30 12 after fact discovery or at least on the day it closed. I don't

14:15:35 13 know that Mr. Hamilton addressed that.

14:15:37 14 But then yesterday late we heard that Mr. Hamilton

14:15:40 15 was planning -- that counsel was planning to file now a

14:15:44 16 preliminary injunction with the thought that they file that

14:15:46 17 April 10th. And at this point, you know, I think it's

14:15:51 18 important that we figure out what horse they're going to choose

14:15:55 19 to ride. And if the horse is -- we're going to ride the PI

14:15:59 20 horse, then I don't disagree with Mr. Hamilton. We ought to

14:16:03 21 just work on the scheduling order through the fall, and I think

14:16:05 22 we can figure a lot of the logistics out and the time deadlines

14:16:11 23 that way. And then we can address the motion for preliminary

14:16:14 24 injunction.

14:16:14 25 There are some -- you know, if he were to file the

14:16:19 1 preliminary injunction, which he's saying he's going to do, we
14:16:23 2 obviously would need time to do two things, and that would be
14:16:27 3 first to respond, because I would presume if he's talking about
14:16:32 4 doing it on the papers, then we're going to see some new
14:16:35 5 affidavits and some things that we haven't seen before. So we
14:16:38 6 would need some time to respond to that PI.

14:16:41 7 Secondly, because we probably are going to see some
14:16:44 8 new -- you know, some new opinions that we hadn't seen before,
14:16:48 9 we would certainly need time to take, you know, the necessary
14:16:52 10 depositions. That said, I think we could do that and file --
14:16:56 11 the State could file its response sometime in mid May, maybe,
14:17:00 12 May 15th, and provide our response. And then however the Court
14:17:05 13 wishes to proceed with respect to their PI, you know,
14:17:09 14 obviously, we would defer to the Court.

14:17:11 15 But if we're going to ride that horse, then it seems
14:17:13 16 to me that we've got to the -- you know, that the Court should
14:17:17 17 just abate the scheduling order that was intended to move the
14:17:21 18 case forward very quickly, and we'll do it in a PI posture, in
14:17:28 19 a way that allows both parties the ability to make their cases
14:17:33 20 both factually and legal.

14:17:35 21 So if that's what they're going to do, I think we're
14:17:39 22 going to need certainly more than the seven days that the
14:17:42 23 Western District provides for to respond to that kind of
14:17:45 24 situation.

14:17:46 25 Now, I will say that -- and this is now -- I think

14:17:49 1 that's -- if that's what the Court -- if that's what the
14:17:53 2 plaintiffs intend to do, then I think the scheduling order
14:17:56 3 should be pushed off and us deal with the PI issues.

14:18:00 4 So, all that aside, I did want to tell the Court
14:18:04 5 that, after the meeting, we have agreed to take some of the
14:18:07 6 video -- some of the depositions by videotape. We did agree to
14:18:14 7 extend the overall scheduling order. We also, with respect to
14:18:17 8 the depositions that he's discussed, the plaintiffs listed 33
14:18:22 9 witnesses on their initial disclosures. We have been able to
14:18:29 10 eliminate some that we don't think we need to depose, but
14:18:32 11 there's still, you know, somewhere around fifteen or so that
14:18:35 12 we'd like to at least talk to if we were going to be moving
14:18:41 13 toward an overall trial.

14:18:43 14 We could probably push that off until a later time if
14:18:46 15 we're going to -- if we're going under the preliminary
14:18:49 16 injunction posture and just take the depositions that were
14:18:53 17 necessary based on what they filed.

14:18:55 18 So we can go, you know, either way. If we want to do
14:19:00 19 the PI, I think the scheduling order should get continued. If
14:19:03 20 we're going to try to go to final trial and not go the PI
14:19:07 21 direction, then we obviously need more time, because we've got
14:19:12 22 to take -- understand, Your Honor, with these shutdown orders
14:19:17 23 and all that's going on, I mean, we've asked them, Who do you
14:19:19 24 represent of those fifteen? And most of those they don't
14:19:21 25 represent. And so we're talking about third-party subpoenas

14:19:24 1 and getting them on a video with one lawyer in one place,
14:19:27 2 another lawyer in another place. And I'm not even sure right
14:19:33 3 now how we would get -- whether or not we're going to be able
14:19:36 4 to get compulsory process of those third-party witnesses that
14:19:40 5 they've disclosed.

14:19:41 6 Now, I've asked them to see if we could just limit
14:19:42 7 that and tell me who you're going to call at a final trial in
14:19:45 8 this case, and they indicated, as Mr. Hamilton said, that they
14:19:49 9 hadn't talked to those witnesses and so they don't know. And
14:19:52 10 so, we -- there is a potential for us shaving those down.

14:19:56 11 So I wanted to just let the Court know where we were,
14:19:58 12 let the Court know that it -- that I think that -- that, you
14:20:01 13 know, this is a crossroads and they pick the route. If it's a
14:20:05 14 PI, then I think everything else can move and we can just focus
14:20:09 15 on the PI, set this thing out, you know, in a normal schedule
14:20:15 16 through November, or whatever the Court deems would be
14:20:17 17 appropriate, but leaving the State enough time to be able to
14:20:23 18 react to the affidavits that would surely be there, the
14:20:26 19 arguments that they would be making, because, you know, to the
14:20:30 20 extent they're factual, we would obviously need the time to
14:20:33 21 take those depositions.

14:20:34 22 So that's the State's position with respect to it,
14:20:38 23 Your Honor. Are there any questions from the Court?

14:20:41 24 THE COURT: Well, yes. Number one, I'm not opposed,
14:20:46 25 if Mr. Hamilton wants to commit to us looking at a request for

14:20:52 1 preliminary injunction first. But none of you are giving me
14:20:56 2 any cold comfort that that does anything but prolong things.
14:21:01 3 I'm still going to have the motion to dismiss. Nobody is
14:21:06 4 saying they'll drop a request for dispositive motions.

14:21:11 5 So I don't mind going ahead that way. I also,
14:21:17 6 Mr. Hamilton, will tell you you need to now eliminate everybody
14:21:23 7 that maybe you've just heard about or seen on television and
14:21:28 8 get it down to who you're actually going to call.

14:21:32 9 One of the things that the coronavirus has done is --
14:21:36 10 and every lawyer needs to understand it because the judges are
14:21:39 11 having to come to ground with it -- it is not a business as
14:21:43 12 usual. This is a massive thing that has had great effects on
14:21:47 13 everybody's docket. I cannot tell you how much time I've spent
14:21:49 14 the last ten days in meetings with judges and reading things
14:21:52 15 coming out of the Administrative Office of the Courts. And all
14:21:56 16 of the administrative and procedural folderol that we've just
14:22:01 17 had to do bureaucratically around here and what we've had to
14:22:06 18 adjust to with our clerk's office out and will be out forever.

14:22:10 19 So what you-all need to do -- you've started on it,
14:22:14 20 but you need to go farther -- is paring this down and getting
14:22:18 21 it ready to go. Now, having said that, if you agree that we
14:22:28 22 can accomplish something by my looking at a request for a
14:22:32 23 preliminary injunction -- a motion for preliminary injunction,
14:22:40 24 what I would like to see from you is an agreed order for me to
14:22:42 25 sign, a scheduling order that abates -- well, that cancels the

14:22:50 1 existing scheduling order, the one that I signed on
14:22:52 2 December 30th, that sets a schedule for the defendant to file a
14:22:58 3 motion for preliminary injunction, a reasonable time for the
14:23:04 4 plaintiff -- I mean, the plaintiff to file a request for a
14:23:09 5 preliminary injunction, a reasonable time for the defendant to
14:23:12 6 respond, and a reasonable time for the plaintiff to reply.

14:23:15 7 And then once I get that I can go ahead, if you-all
14:23:28 8 are in agreement, I'll look at this without further argument.
14:23:32 9 And I think you-all have gone a long way toward developing this
14:23:35 10 case on the very bunch of stuff -- group of things that I
14:23:39 11 already have, and I suspect you'll write good briefs on this,
14:23:44 12 and I deal with that. And if I grant the preliminary
14:23:50 13 injunction, then we get back together and discuss what needs to
14:23:53 14 be set from that point forward, and the same would be true if I
14:23:58 15 denied the preliminary injunction.

14:24:00 16 So if in between these dates, if this is the way you
14:24:07 17 want to go, you want to schedule some discovery that would just
14:24:12 18 be germane to the request for preliminary injunction, you can
14:24:17 19 do so. But I do think -- we've used a lot of metaphors here
14:24:21 20 today, but I do think we are at the point where a decision
14:24:24 21 needs to be made right now -- maybe not right this minute -- on
14:24:30 22 whether or not we want to go that route or whether we want to
14:24:33 23 continue to proceed the way we are.

14:24:37 24 You've got a potential problem with a trial setting
14:24:40 25 based on the number of things I'm going to have to rule on

14:24:44 1 anyway, but I tend to think you-all might be correct, that this
14:24:47 2 is a better way to go about it than the way we've been going
14:24:53 3 about it.

14:24:54 4 What a lot of times is overlooked is -- and I'm all
14:25:00 5 in favor of a transparent court and transparent justice system.
14:25:05 6 But the problem that arises is lawyers look at the calendar
14:25:09 7 that is online and see that I don't have something set one day
14:25:13 8 or three days in a row or for a week and immediately think
14:25:17 9 those are free days when I can set things. Well, they're not,
14:25:22 10 because with the size of our docket, it takes a long time to
14:25:26 11 write things and to research things.

14:25:29 12 And on well-lawyered, hotly-contested cases, it may
14:25:33 13 seem very obvious to each side, like in this case, which way
14:25:38 14 the Court has to go, but it's not that obvious to the Court.
14:25:43 15 We need to backstop what you put in your briefs. We need to do
14:25:50 16 individual research. And then it's not the easiest and
14:25:53 17 simplest thing to draft an opinion that is coherent, that the
14:25:59 18 party that doesn't like it can take to the Circuit.

14:26:03 19 So there's a lot of time involved with the
14:26:08 20 court that is not immediately apparent from the public docket
14:26:12 21 which is posted. And, again, I say what I did a couple of
14:26:17 22 weeks ago, I've got 400 civil cases on any docket. Every one
14:26:21 23 of them has got a problem right now because of the coronavirus,
14:26:25 24 and I have an increasing number of criminal cases that I'm
14:26:29 25 having to deal with first. So you need to factor all that in.

14:26:33 1 So where are we? Do we want to make a decision? Are
14:26:36 2 you-all prepared to make a decision on the route you want to
14:26:40 3 take right now or do you want to talk about it and regroup? We
14:26:44 4 started with Mr. Hamilton before, so, Mr. Hamilton, tell me
14:26:48 5 your current thinking.

14:26:48 6 MR. HAMILTON: Well, Your Honor, I have two thoughts.
14:26:56 7 First, I think it makes sense for us to regroup and allow me to
14:26:58 8 chat or discuss with our team on our side and with Mr. Sweeten,
14:27:03 9 and then we can come up with an agreed order and reconvene.

14:27:07 10 The second thought I had -- and perhaps this ship has
14:27:14 11 sailed and it's not worth raising -- but it would be to
14:27:21 12 accelerate the trial, take the Daubert motion and dispositive
14:27:23 13 motions and those with the trial, roll it all up, and do a
14:27:27 14 trial in early May or early June.

14:27:32 15 That would -- I'm listening to the Court and I'm
14:27:35 16 trying to streamline things. We have a motion to dismiss now.
14:27:39 17 If that's denied, then we have a trial that -- that just
14:27:45 18 incorporates all of the fending motions.

14:27:49 19 THE COURT: If we were to do that -- and I think
14:27:52 20 that's a good idea because nobody waives anything -- I don't
14:27:56 21 look for this to be a lengthy trial. I understand your need
14:28:01 22 for some discovery. But, as I told you before, I look at it a
14:28:05 23 lot more as a legal issue than you do. And nobody -- and,
14:28:11 24 Mr. Sweeten, you don't need to comment on this right now. But
14:28:15 25 we could very easily roll all of the issues into one hearing,

14:28:21 1 you could have argument on it, and we could get it done.

14:28:24 2 And I would suggest -- and I'm going to turn you
14:28:28 3 loose to talk about this, too, along with what else you're
14:28:31 4 talking about.

14:28:32 5 If we did that, the smartest course would be to do it
14:28:36 6 sometime in June, because I'm not convinced that all of the
14:28:40 7 operating orders we have that end the end of April are not
14:28:45 8 going to get extended. I would be concerned about setting this
14:28:53 9 before June.

14:28:53 10 One of the reasons is, this is part of the situation
14:28:59 11 that we have here, the marshals service and other people that
14:29:04 12 advise us want us to keep as few people in the courthouse and
14:29:08 13 as many people out of it as we can. I'm hopeful that we get
14:29:12 14 back to business as normal in May, but I'm not confident of
14:29:16 15 that.

14:29:21 16 MR. HAMILTON: Your Honor, one thing I would just
14:29:22 17 point out, in one of the cases we have, a similar elections
14:29:25 18 case with a similar issue in Florida, the court has scheduled a
14:29:29 19 Zoom trial, where the parties appear by video before Your Honor
14:29:33 20 and we argue it.

14:29:36 21 THE COURT: That would not be my favorite thing. I
14:29:40 22 would do that as a last alternative. One reason is I don't do
14:29:45 23 that kind of stuff well. I'm old school. You're dealing with
14:29:49 24 an old man who hopes he can survive the virus and still be
14:29:54 25 around. If it really gets bad and we have to do it that way,

14:30:01 1 I'll listen to it, but that's not going to be where I want to
14:30:04 2 start planning right now.

14:30:09 3 MR. HICKS: Your Honor, Renea Hicks for the Blodgett
14:30:11 4 plaintiffs.

14:30:11 5 THE COURT: Well, Mr. Hicks, you of all people know
14:30:14 6 that when we got away from yellow pads and ballpoint pens as
14:30:18 7 our technology, I totally lost all contact with what you-all
14:30:21 8 do.

14:30:21 9 MR. HICKS: I haven't gotten away from those yet.

14:30:23 10 THE COURT: Okay.

14:30:24 11 MR. HICKS: I know you're disappointed that I don't
14:30:27 12 have more to say, but I just wanted to get clear that we're
14:30:31 13 riding along with what Mr. Hamilton is saying on behalf of the
14:30:34 14 other plaintiffs. So I just won't step in otherwise.

14:30:37 15 THE COURT: I understand that, Mr. Hicks, and I
14:30:39 16 admire your restraint.

14:30:43 17 Mr. Sweeten, what is your next comment?

14:30:49 18 MR. SWEETEN: Well, Your Honor, as we walked in --
14:30:50 19 walked into the conference room with this telephone call with
14:30:54 20 an agreement that we would at least have until -- with opposing
14:30:58 21 counsel that we would at least have until June 1st to conduct
14:31:00 22 our discovery and he agreed that we've got a whole bunch of
14:31:04 23 logistical issues. So when we're talking about finishing this
14:31:08 24 case up in May, that obviously concerns me. I think we
14:31:13 25 could --

14:31:14 1 THE COURT: Well, let me just tell you we're not
14:31:16 2 going to finish this case in May. That was what I meant by my
14:31:20 3 previous conversation. Nothing is going to happen that early.

14:31:23 4 MR. SWEETEN: Okay. And so taking now I think what
14:31:28 5 the Court is now talking about is a world in which the PI
14:31:31 6 doesn't exist, then I think that -- or they haven't filed it,
14:31:36 7 then I think that right now, you know, I think the big issue is
14:31:40 8 the MTD, which has jurisdictional issues and sovereign immunity
14:31:46 9 issues. So I think that would be the first boulder to move.

14:31:48 10 We have a whole bunch of discovery that we would feel
14:31:51 11 like we need to do unless, you know, in discussions with
14:31:54 12 Mr. Hamilton tells me I'm not calling that witness, I'm not
14:31:57 13 using that guy. I'll cut those depos. I just need to take who
14:32:01 14 he's going to put up at any sort of trial of this matter.

14:32:04 15 So I think we can go back, you know, to pre-yesterday
14:32:08 16 afternoon when I heard they were thinking of filing a PI, and
14:32:11 17 we could proceed with the trial itself. I do think we need
14:32:15 18 fact discovery, you know, to be extended until June 1st and the
14:32:19 19 other deadlines that we had all talked about.

14:32:22 20 THE COURT: All right. Stop right there. We don't
14:32:25 21 need to talk about all this. Here's the deal: I haven't taken
14:32:28 22 anything off the table. All right? I think the best way to
14:32:31 23 proceed would be to find you a trial setting sometime in June,
14:32:37 24 if you could get everything done then, or at least July. If we
14:32:42 25 had a trial that put all of these issues in it sometime in that

14:32:48 1 range, by mid summer or before the end of July, I have every
14:32:52 2 reason to believe we could get a final judgment out well before
14:33:00 3 the election and an opportunity for whoever didn't like it to
14:33:03 4 get to the Circuit, at least to their emergency panel, as
14:33:06 5 quickly as possible.

14:33:07 6 That is an alternative. If that doesn't work for
14:33:12 7 you-all I am not opposed to looking at going the preliminary
14:33:15 8 injunction route and seeing how that works out. But we all
14:33:20 9 don't need -- I don't need to be in on your discussions on
14:33:24 10 that. I'm happy to go whichever route you want to take,
14:33:28 11 bearing in mind that there are bumps in that road based on
14:33:34 12 where we're hung up with the coronavirus stuff on being able to
14:33:38 13 deal with things as efficiently as I would like to and the fact
14:33:41 14 that I do have a big docket. But, in and around that, I will
14:33:45 15 tell you I find this to be an important case, so I'm going to
14:33:48 16 try to accommodate you where I can.

14:33:50 17 But go back to what I said earlier, this is not
14:33:53 18 business as usual anymore. You-all are going to have to sit
14:33:58 19 down, and as loath as I am to use modern vernacular, think
14:34:02 20 outside the box and come up with a procedure or a way that
14:34:09 21 protects you both, to where you can make the strongest argument
14:34:13 22 you can on your respective positions, and we get this thing out
14:34:16 23 of the trial court and on down the way as quickly as possible.

14:34:22 24 So I think what I would like to do right now is not
14:34:26 25 do anything except ask you-all how long would you need to take

14:34:32 1 to have some time discussing this and trying to come up with a
14:34:35 2 road or a path and how you want to do it, and then we convene
14:34:39 3 another phone call in the near future and talk about that.

14:34:44 4 I sound like Ross Perot many years ago when he was
14:34:49 5 running for president. I'm all ears, you know.

14:35:00 6 MR. HAMILTON: Your Honor, Mr. Hamilton for the
14:35:01 7 plaintiff.

14:35:01 8 I would -- perhaps Monday? This coming Monday would
14:35:05 9 be -- I think that would give us the balance of today,
14:35:08 10 Thursday, and Friday to discuss with Mr. Sweeten the
14:35:16 11 alternatives and some dates and see if we can reach an
14:35:19 12 agreement. And, if we can't, at least highlight where we're
14:35:22 13 disagreeing and then reconvene on Monday to present that to the
14:35:26 14 Court. We could also probably do it by Friday as well. But
14:35:29 15 there are depositions scheduled for both Thursday and Friday,
14:35:32 16 so I'm thinking Monday.

14:35:33 17 THE COURT: I'm not pushing you on this, because
14:35:35 18 we've got a little breathing room right now anyway under the
14:35:39 19 existing order.

14:35:40 20 So, Mr. Sweeten, what do you think about getting
14:35:42 21 together Monday? And I'm not trying to push you to Monday if
14:35:45 22 you need more time than that. I'm much more interested in
14:35:49 23 you-all having sufficient time to discuss this with your
14:35:52 24 clients and discuss it among yourselves and come up with a path
14:35:55 25 to the end that makes sense that we can all live with than I am

14:35:59 1 pushing you to give me a response on Friday or Monday or
14:36:04 2 Tuesday.

14:36:05 3 I remind you-all, as I remind lawyers all the time,
14:36:09 4 you only have one role in this, case and that's to resolve the
14:36:12 5 case. And we've discussed various ways you can get it to the
14:36:15 6 point of resolution. There may be more that we haven't even
14:36:19 7 thought about.

14:36:19 8 So, Mr. Sweeten, tell me what you think would be a
14:36:21 9 reasonable period of time for us to try to regroup here.

14:36:25 10 MR. SWEETEN: Your Honor, I think that we can make
14:36:27 11 some progress between now -- I think Monday sounds great. I
14:36:31 12 think we can get back to this court, and hopefully we will have
14:36:34 13 made some progress on, you know, the witness numbers and the
14:36:40 14 scheduling order and some other issues. So I'm hopeful that we
14:36:43 15 can make some progress.

14:36:44 16 THE COURT: No. Let me tell you what I want you to
14:36:46 17 make some progress on more than that. I want you to make some
14:36:50 18 progress over what the path is, not the -- it would be good to
14:36:53 19 have it on the witnesses and stuff. But I want to know if
14:36:57 20 there is a chance that, if I block out time in June or July, we
14:37:03 21 can hear this case on the merits. I want to know, if we're not
14:37:06 22 going to do that, what you-all have talked about, about going
14:37:12 23 the preliminary injunction route.

14:37:13 24 Otherwise, I can deal with your witness stuff right
14:37:16 25 now. I've heard enough on it, and I can get an order out this

14:37:19 1 afternoon telling you what you're going to do with your
14:37:21 2 witnesses.

14:37:22 3 So I want a much more in-depth study by you-all about
14:37:28 4 resolving this case and how we're going to do it. And, again,
14:37:32 5 think outside the box. You know, it is not business as usual.
14:37:36 6 Listen to those two things. That's what I want. I want you to
14:37:39 7 forget the way you've tried every other lawsuit you've ever
14:37:43 8 tried and come up with some reasonable way to get this case
14:37:47 9 done.

14:37:48 10 Now, how long do you need to have discussions about
14:37:51 11 that?

14:37:51 12 MR. SWEETEN: Oh, I think -- and I did intend -- I'm
14:37:55 13 sorry I didn't put that in my list. I did intend to talk about
14:37:58 14 all those issues, Your Honor, and will do. And Monday would be
14:38:01 15 enough time, I think, for Mr. Hamilton and I and our groups to
14:38:04 16 get together and try to see what we can work out and then come
14:38:08 17 back and report to the Court.

14:38:09 18 THE COURT: All right. Would you prefer to have the
14:38:11 19 telephone conference in the morning or in the afternoon?

14:38:18 20 MR. SWEETEN: I think either way would work, but I'd
14:38:19 21 probably prefer Monday afternoon about this same time if that's
14:38:24 22 all right with the Court.

14:38:24 23 THE COURT: It would be a little later. I could give
14:38:25 24 you three o'clock. I've got another -- everything I'm doing is
14:38:27 25 by telephone right now, obviously. But I've got another

14:38:31 1 telephonic conference at 2:00. So how would three o'clock
14:38:35 2 Monday sound for you-all?

14:38:36 3 MR. SWEETEN: That works well, Your Honor.

14:38:37 4 MR. HAMILTON: And for Mr. Hamilton for the
14:38:40 5 plaintiffs, that's fine, Your Honor. That works well.

14:38:42 6 THE COURT: All right. Then I'm going to leave
14:38:44 7 everything we have in place now in place, and we will
14:38:47 8 reschedule the telephonic scheduling conference for
14:38:53 9 three o'clock on Monday. It will be the same call-in and
14:38:56 10 everything that you already have.

14:39:00 11 And you-all see what you can come up with, because I
14:39:03 12 mean it: I will accommodate you any way I can reasonably
14:39:10 13 accommodate you if you-all will work together on this.

14:39:16 14 MR. HAMILTON: Thank you, Your Honor. We very much
14:39:17 15 appreciate that.

14:39:18 16 THE COURT: All right. I look forward to talking
14:39:20 17 with you again on Monday.

14:39:22 18 MR. HAMILTON: All right. Thank you, Your Honor.

14:39:23 19 MR. SWEETEN: Thank You, Judge.

14:39:24 20 MR. HICKS: Thanks.

14:39:25 21 (End of transcript)

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1 | UNITED STATES DISTRICT COURT)

2 | **WESTERN DISTRICT OF TEXAS**)

I, Arlinda Rodriguez, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

10 WITNESS MY OFFICIAL HAND this the 29th day of
11 September 2020.

12

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